Nebraska Law Review

Volume 78 | Issue 4 Article 11

1999

Concurrent Omission: How Should Liability be Allocated? *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999)

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Note*

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I. INTRODUCTION

On occasion, a fact pattern will arise in a tort action where a concurrent omission by two negligent defendants has brought about a situation causing injury to an innocent plaintiff.[1] For example, defendant *X*, a rental agency, negligently fails to discover or repair a required safety device such as automobile brakes, and defendant *Y*, a driver, while using the instrumentality, subsequently fails to use the safety device at all, causing injury to the plaintiff.[2] When this happens, the element of causation must be carefully analyzed because it is possible that both defendants could be exonerated, leaving the plaintiff without redress.

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1. I had the pleasure of researching this very fact pattern during the summer of 1999 for Professor Harvey Perlman to assist him in his responsibilities as co-reporter for the RESTATEMENT (THIRD) OF TORTS. I thank him for his patience and his interest in my own discovery of this area of Tort law.
2. *See* David Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997) (using this illustration as an example of concurrent omission to guide his own analysis).

Normally, the plaintiff has the burden of proving the causal link between the defendant's wrongful conduct and plaintiff's injuries by a preponderance of the evidence. In the particular situation previously described, the plaintiff *is* able to show that the resultant injuries would have occurred. However, both defendants might be able to escape liability. The traditional premise of "but for" is inconclusive as to each defendant.[3] The rental agency, *X*, will say that even if they had provided a safe vehicle, defendant *Y's* negligence in failing to apply the brakes would still have caused the injuries. Likewise, the driver, *Y*, will say that even if they had attempted to properly apply the brakes, the brakes would have failed, due to *X's* negligence in not discovering or fixing the brake deficiency, and the injuries would have occurred. Under such analysis both defendants technically are exonerated of all liability.

The language of the *Restatement (Second) of Torts* is not helpful in assigning liability either. Using the *Restatement*, one must decide if each omission was a "substantial factor" in bringing about the injury.[4] However, the term "substantial factor," which has come to mean many things to the courts, may prove confusing to a jury, and its application has been inconsistent in case law.[5]

An instance in case law that may provide insight into this narrow issue of causation is found in product liability/failure to warn cases. *Haag v. Bongers*,[6] a case recently decided by the Nebraska Supreme Court, provides a look into a situation where causation could have been discussed, even though the case was decided on different grounds. In *Haag*, the question of how to analyze the issue of causation and the issue of where the burden of proof lies may be determinative of where liability falls.[7] But, even though the failure to warn cases provide insight into this narrowly defined area, they cannot pro-

3. The traditional test for finding causation is the "but for" or *sine qua non* test: defendant's negligence is a cause in fact of an injury where the injury would not have occurred *but for* defendant's negligent conduct. *See* RESTATEMENT (SECOND) OF TORTS § 432(1) (1965).

4. *See* RESTATEMENT (SECOND) OF TORTS § 431 (1965).

5. *See* Robertson, *supra* note 2, at 1776. Robertson identifies three inconsistent applications of the "substantial factor" test derived from the RESTATEMENT (SECOND) OF TORTS § 432(1) to (2) and §§ 431, 433: (1) as a substitute for the but-for test in a limited category of cases in which "two causes concur to bring about an event, and either cause, operating alone, would have brought about the event absent the other cause."; (2) as a test more or less interchangeable with the but-for test whenever the but-for test is proving difficult to work with for whatever reason; and (3) as an approach to the issue of legal causation or ambit of duty. *See also* Magee v. Coats, 598 So. 2d 531, 536 (La. Ct. App. 1992) (citing Leueune v. Allstate Ins. Co., 365 So. 2d 471, 476-77 (La. 1978)).

6. 256 Neb. 170, 589 N.W.2d 318 (1999).

7. *See infra* Part II.

vide the answers, and stand only as an example of how courts analyze this particular fact pattern and where the tendencies currently fall.

The purpose of this note is to demonstrate how the academics and the courts choose to deal with concurrent omissions that prevent an innocent plaintiff from meeting the burden of proof on causation. Providing insight into how these situations could best be handled in the future relies on the foundation of policy concerns that arise in the context of concurrent omission cases. Whether to exonerate one negligent defendant because another individual has also acted negligently in the same set of circumstances is ultimately a question of policy.

II. WHAT DID NEBRASKA DO?—*HAAG V. BONGERS*

Recently in Nebraska, a strict liability/failure to warn case found its way to the Supreme Court. The case demonstrates an application of the concurrent omission analysis set forth previously. *Haag v. Bongers* involved an injured plaintiff who sued several defendants following an injury occurring during an auction.[8]

The plaintiff was a patron and bidder at an estate auction held near David City, Nebraska. Part of the estate consisted of a number of antique cars. Due to the cold weather, indoor accommodations for all bidders were provided. The auction was held in a building, open at both ends, so the cars could be towed through. After the sale of one particular antique Studebaker truck, the auction assistants attempted to tow the truck out of the building. They experienced difficulty. The hitch ball detached from the drawbar of the tractor, flew off the tractor, and hit the plaintiff in the head causing serious injuries.[9] The evidence showed that the drawbar on the tractor was double the size normally found on that type of tractor and that all threads on the shank of the hitch ball had not been engaged. The plaintiff sued the estate that held the auction, the two auctioneer companies that facilitated the day's events, and Putnam, the manufacturer of the hitch ball.[10]

The plaintiff alleged, among several other things, that the estate and the auctioneers were negligent because their assistants did not properly affix the hitch ball. The plaintiff also alleged that Putnam was strictly liable for the plaintiff's injuries for failing to provide sufficient warnings and instructions on the hitch ball.[11]

At trial, experts testified as to the cause of injury, the alleged misuse of the hitch ball, the foreseeability of that misuse, and whether the

8. *See Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

9. *Id.* at 175, 589 N.W.2d at 324.

10. *Id.*

11. *Id.* at 175-76, 589 N.W.2d at 324-25.

hitch ball was unreasonably dangerous.[12] The jury held all defendants liable and awarded damages to the plaintiff in the action.[13]

On appeal, an issue raised by the defendant manufacturer, Putnam, provides insight into how Nebraska courts deal with the issue of causation, particularly in the narrow area of a concurrent omission.

Putnam, the manufacturer, contended that the trial court abused its discretion in not allowing Putnam's counsel to state in his closing argument that the evidence established that even if a warning had been given by Putnam, it would not have been read or heeded by the auctioneer assistants.[14]

Essentially, the manufacturer's argument was reflective of this narrowly defined area of causation where two or more negligent omissions result in injury or damage. Putnam would have been exonerated of liability by successfully arguing that the failure of the auctioneer assistants to read any possible warning preempted Putnam's failure to provide the warning. It could argue that, even though Putnam may have been negligent in not providing an adequate warning, the auctioneer assistants would not have read it anyway, and the accident would still have occurred. Therefore, the plaintiff could not have proven the element of causation as to Putnam.[15]

However, upon closer examination, it does not take long to determine that the contrary is also true. The estate and auctioneers could also have relied on the plaintiff's inability to meet the burden of proof on causation as to the estate and the auctioneers. The auctioneers could have argued that regardless of whether their employees read the warning or not, the fact that the warning was not there caused the injury. If the employees had read the warning, the accident still would have happened because the label did not appropriately address the importance of having all threads on the shank engaged. Thus, both negligent defendants are able to point at the other and say "but

12. *Id.* at 179-80, 589 N.W.2d at 326-27.
13. *Id.* at 180, 589 N.W.2d at 327.
14. *Id.* at 181, 589 N.W.2d at 327.
15. To recover under a claim of strict liability a plaintiff must prove by a preponderance of the evidence that

> (1) the defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate cause or proximately contributing cause of the plaintiff's injury sustained while the product was being used in a way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) the plaintiff's damages were a direct and proximate result of the alleged defect.

Id. at 182-83, 589 N.W.2d at 328 (quoting Kudlacek v. Fiat S.p.A, 244 Neb. 822, 509 N.W.2d 603 (1994)).

for" the other's negligent act, the injury would not have occurred. If a court accepts this strict view of causation, an innocent plaintiff is left without redress.

So how did the trial court choose to deal with the particularly plexing issue of causation that potentially could have exonerated all defendants in *Haag v. Bongers*? The trial court refused to exonerate the manufacturer and held all defendants liable.[16] But, this was not accomplished under a causation analysis. Due to the limited standard of review on appeal, the Nebraska Supreme Court affirmed the trial court's decision.[17] However, had the issue of causation been more closely addressed at trial, the direction of the court's thoughts concerning the liability of the parties may have been different.

Holding all defendants liable and placing the burden on each to exonerate himself may be an effective state of the world in Nebraska. The Nebraska Supreme Court accepts the premise that it was defendant Putnam's obligation to present evidence that the warnings would not have been read.[18] Putnam asserted the record reflected that a warning would not have been read, but did not put on its own evidence to support it.[19]

Requiring the defendant to prove that the warning would not have been read in order to be relieved of liability is supported by the Second Circuit in *Liriano v. Hobart Corporation*.[20] In *Liriano*, Judge Calabresi held that

> [w]hen a defendant's negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of injury that ensued, that very causal tendency is evidence enough to establish a prima facie case of cause-in-fact. The burden then shifts to the defendant to come forward with evidence that its negligence was not such a but-for-cause.[21]

Calabresi's idea of placing the burden on the manufacturer demonstrates the reality that manufacturers are often unable to accomplish this proof and are not relieved of liability. It is difficult for a manufacturer to prove in a court of law that even if a warning had been provided it would not have been read.

The facts of *Liriano* are similar to the facts of *Haag*. In *Liriano*, the plaintiff was severely injured during the course of employment when his hand was caught in a meat grinder. The employer had removed the attached safety guard, but at issue was whether a warning should have been affixed to the machine to indicate that the grinder should be operated only with a safety guard attached.[22] The defend-

16. *See* Haag v. Bongers, 256 Neb. 170, 194, 589 N.W.2d 318, 334 (1999).
17. *See id.*
18. *See id.* at 186, 589 N.W.2d at 330.
19. *See id.*
20. 170 F.3d 264 (2d Cir. 1998).
21. *Id.* at 271.
22. *See id.* at 269.

ant argued that the plaintiff failed to present any evidence that the defendant's failure to place a warning on the machine was causally related to his injury.[23] But, the Second Circuit noted that this burden, in fact, was on the defendant and not the plaintiff: "[I]n a case like this, it is up to the defendant to bring in evidence tending to rebut the strong inference, arising from the accident, that the defendant's negligence was in fact a but-for cause of the plaintiff's injury."[24]

The difference in *Liriano* is one of form, not substance. *Liriano* does not involve the concurrent negligence of two defendants, but rather the issue of a negligent defendant and the contributory negligence of the plaintiff. The Nebraska Supreme Court, seemingly without much hesitation, has applied the theory that the burden of proof is on the defendant.[25] It seems that the premise adopted by Judge Calabresi in the Second Circuit and the Nebraska Supreme Court in *Haag v. Bongers* is tightly reasoned, easily applicable, and firmly grounded in policy allowing for the relief of an innocent plaintiff.

III. SETTING THE STAGE FOR A CONCURRENT OMISSION DISCUSSION

What *Haag* provides is an insight into how the issue of causation can be dealt with when the omissions of two negligent defendants create a set of circumstances where an innocent plaintiff is unable to prove "but for" causation. "Causation" is often discussed by academics and practitioners as an area lacking concrete principles and guidance.[26] As a result, courts deal with the issue of causation differently depending on the fact pattern they face in the pending case. Although a situation involving a concurrent omission seems rare, the consequences of the causation analysis in these cases should be carefully considered because the application may become readily applicable in a number of other situations.

There is limited information on the way courts deal with this narrow illustration, but discussion among academics is prolific. The following is a brief summary of some of the academic views, followed by an analysis of the relevant case law.

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23. *See id.* at 271.
24. *Id.*; *see also* Zuchowicz v. United States, 140 F.3d 381, 388 nn.6-7, 390-91 (2d Cir. 1998).
25. *See* Haag v. Bongers, 256 Neb. 170, 185, 589 N.W.2d 318, 330 (1999).
26. In fact, the RESTATEMENT (THIRD) OF TORTS is currently underway in this area with particular scrutiny being given to the ways in which courts have dealt with the "substantial factor" requirement of the RESTATEMENT (SECOND). *See, e.g.*, Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335; David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765 (1997); Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735 (1985).

A. Academic Views

In *The Common Sense of Cause in Fact*,[27] David Robertson discusses alternative approaches to cause in fact in an attempt to define a user-friendly application for lawyers, law students and academics. One approach Robertson discusses involves an analysis of how to handle causation in the marginal cases (the focus of this note) involving concurrent omissions and the nonuse or misuse of defective or missing safety devices. He describes these situations using a case that exemplifies the hypothetical involving defendant *X* and defendant *Y*, where both have negligently failed to act in a specific way, causing injury to an innocent plaintiff.[28] Both omissions, or negligent acts, are independently sufficient to cause the plaintiff's injury. Therefore, both defendants can argue that their conduct was not the necessary cause (the "but for" cause) of the accident. How a court characterizes each defendant's behavior is determinative of where liability falls in the plaintiff's cause of action.

Robertson asserts that the most convincing approach to a situation where each defendant's wrongful conduct keeps the other's from becoming operative "is to recognize the destruction of a personal injury lawsuit as an actionable harm."[29] He states that neither the "but for" or "substantial factor" test provides a sufficient solution to this problem of causation. He asserts that "the substantial factor approach to the bad brakes case does not seem very satisfactory because too many jurors would say that neither defendant's omission was a substantial factor in producing the plaintiff's injuries."[30]

However, contrary to what Robertson states, the assertion could also be made that a jury may find that a defendant is not the "but for" cause of the plaintiff's injuries but still intuitively find that the defendant's actions substantially contributed to those injuries, thereby allocating liability. Both assertions are merely speculative and unsupported by documented jury patterns.

Robertson finds support for his theory of liability based on the destruction or impairment of the plaintiff's case against the other tortfeasor from Prosser's comment in *The Law of Torts*.[31] Prosser addressed two cases involving two negligent defendants, each preventing the other from being a cause of injury. Although Prosser states that "it may be said with some confidence that if any such case is considered, both parties will be held liable; but the theory of liability is not

27. Robertson, *supra* note 2.
28. *See, e.g.*, Saunders Sys. Birmingham Co. v. Adams, 117 So. 72 (Ala. 1928).
29. Robertson, *supra* note 2, at 1787.
30. *Id.*
31. WILLIAM L. PROSSER, HANDBOOK OF LAW OF TORTS § 41, 239-40 n.25 (4th ed. 1971).

so clear,"[32] he adds an additional comment that "[p]erhaps the best guess is that each, by his negligence, has deprived the plaintiff of a cause of action against the other, and so should be liable."[33]

However, in the fifth edition, Posser deletes such commentary and states only that neither case cited considers the point of whether the negligence of one prevents the other from being a but-for cause.[34] For some reason, the feasibility of maintaining a cause of action for "depriving a plaintiff of a cause of action against the other" was lost in the updating, possibly because it was too academic for practical purposes.[35]

Intuitively, Robertson allocates liability among both defendants. Robertson concludes that by treating as actionable the destruction of the plaintiff's case against the other tortfeasor, both defendants could be liable in a potential personal injury action, thereby eliminating the problematic cause in fact issue and providing relief to an innocent plaintiff.[36]

In *Causation in Tort Law*,[37] Richard Wright takes a different approach to this illustration. He begins by examining how Leon Green,[38] and Becht and Miller[39] approach this problem as a basis for unfolding his own theory of the "Necessary Element of a Sufficient Set" Test ("NESS")[40] which relieves defendant *X* from liability.

Wright asserts Leon Green's conclusion that defendant *X*, by supplying the defective safety device, is liable for any injuries inflicted on others by defendant *Y*, who failed to use the device at all, "because presumably [*Y*] would not have been driving if [*X*] had told him about the defective brakes."[41] But, Wright feels that the analysis under Green's duty-risk theory is "a causal ('but for') argument masquerading as a duty issue."[42]

Becht and Miller come closer to Wright's theory by looking specifically at the defendant's tortious conduct. However, according to Wright, their approach "requires that the tortious act or omission have been a necessary condition for one of the positive (actual) causal

32. *Id.*
33. *Id.*
34. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, 267 n.27 (5th ed. 1984).
35. *See* Robertson, *supra* note 2, at 1788.
36. *See id.* at 1787.
37. Wright, *supra* note 26.
38. Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962).
39. ARNO L. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961).
40. *See* Wright, *supra* note 26, at 1788.
41. *Id.* at 1762 (basing his analysis on Green's own resolution in *The Causal Relation Issue in Negligence Law*.
42. *Id.*

sequences that contributed to the injury."[43] As a result, Wright asserts that they would be forced to deny that causation exists in the defective safety device scenario because neither omission was a necessary condition in producing the injury.[44]

In support of his own NESS (Necessary Element of a Sufficient Set) test, Wright asserts that defendant *Y's* failure to use the brakes is a preemptive cause of the plaintiff's injuries thereby relieving *X* of liability. He comes to this conclusion by defining each defendant's conduct in terms of whether it is a necessary element of any set of antecedent *actual* conditions that was sufficient for the occurrence of the injury.[45] By narrowly defining the conditions necessary for the injury, Wright successfully relieves defendant *X* from liability. "[*Y's*] failure to try to use the brakes was necessary for the sufficiency of a set of actual antecedent conditions that did not include [*X's*] failure to repair the brakes, and the sufficiency of this set was not affected by [*X's*] failure to repair the brakes."[46] However, the fine distinctions made by Wright have been criticized as inapplicable and circular in application.[47]

David Fischer provides his own analysis of the illustrated problem by finding a close analogy between the defective safety device cases and other types of concurring-omission cases, such as *New York Central Railroad v. Grimstad*[48] and product liability failure-to-warn cases. Interestingly, he discovers similarities with cases involving situations "where an inadequate warning was given and the user did not read it, or in which no warning was given but it appeared the user would not have read and followed a warning had one been supplied."[49]

> In this . . . category of cases, . . . courts have not recognized the presence of the multiple-sufficient-cause problem. Courts resolve these cases in a number of ways.
>
> One line of cases requires plaintiff to show that a proper warning would have prevented the accident by altering the user's behavior. These cases exonerate the manufacturer on the ground that the failure to warn did not cause the accident because the warning was not read. Some cases appear to do so on the basis of the but-for test. Others find, without analysis, that the accident was caused by the failure to read the label or manual. They do not appear to recognize that application of the but-for test does not support this result.[50]

43. *Id.* at 1787 (providing an analysis of BECHT & MILLER, *supra* note 39).
44. *Id.*
45. *See id.* at 1801.
46. *Id.*
47. *See* Fischer, *supra* note 26, at 1359 (stating that "in multiple-omission cases, the NESS test can be manipulated to produce differing results" and "is helpful only in rationalizing results made on unarticulated bases; it is not helpful in reaching the results").
48. 264 F. 334 (2d Cir. 1920).
49. Fischer, *supra* note 26, at 1352.
50. *Id.* at 1353-54 (footnotes omitted).

Fischer's intuition in allocating liability in the concurrent omission cases is to hold both negligent defendants liable in the interest of corrective justice: "[C]orrective justice can often be achieved by imposing liability in multiple-sufficient-omission cases. Neither temporal sequence, lack of independent sufficiency, nor lack of a second wrongdoer provides a sufficient basis for exonerating a culpable wrongdoer at the expense of an innocent plaintiff."[51]

B. Case Law

Only a few courts have dealt with situations where multiple, sufficient causes impair a plaintiff's cause of action. The most notorious case is *Saunders System Birmingham Co. v. Adams*.[52] *Saunders* provides the basic fact pattern most academics analyze. In *Saunders*, the defendant rented a car, with allegedly defective brakes, to a driver, who allegedly traveled at an excessive rate of speed and failed to adequately apply brakes. The plaintiff was injured as a result. The court held that if the jury determined excessive speed was the proximate cause of the accident, the rental agency was in no way liable to the plaintiff because its negligence in providing defective brakes did not cause the accident.[53] The court did not specifically address the multiple-sufficient cause issue.

Rouleau v. Blotner[54] is also often cited. *Rouleau* is a case, similar to *Saunders*, where the court exonerated the first negligent defendant on the basis of preempted causation. In *Rouleau*, the defendant negligently failed to use a signal when he made a left turn in front of the plaintiff, who approached along with oncoming traffic. As a result, the plaintiff stopped in traffic, causing injuries. It was determined that the plaintiff would not have seen the signal anyway and its absence was no ground for complaint. The plaintiff's negligence in failing to maintain proper lookout was deemed the proximate cause of the injuries.[55]

Alternatively, the court in *Sears v. Interurban Transportation Co.*[56] found no reason to relieve the defendant of liability when the

51. *Id.* at 1381.
52. 117 So. 72 (Ala. 1928).
53. *See id.* at 73-74.
54. 152 A. 916 (N.H. 1931).
55. *See id.*; *see also Eklof v. Waterston*, 285 P. 201 (Or. 1930) where the court reversed a judgment against a rental corporation for negligently providing defective brakes on a rented vehicle because the proof showed that the direct and proximate cause of the plaintiff's injury was the negligent driving of the bailee. When the bailee accelerated the vehicle to avoid hitting a streetcar, he ran over a curb and into a fire hydrant that was thrown against the plaintiff. The condition of the brakes was found to be, at most, only a condition or circumstance surrounding the accident.
56. 125 So. 748 (La. Ct. App. 1930).

plaintiff, who was driving defendant's car at an allegedly reckless speed, swerved down a hill to avoid hitting a parked car. The plaintiff went over an embankment and was injured.[57] Plaintiff attributed the accident to a faulty steering gear and the defendant pled contributory negligence on the part of the plaintiff.[58] However, in this case, the defendant had knowledge of the possible defect in the steering column and failed to notify the plaintiff when the plaintiff offered to drive.[59] The evidence clearly indicated the condition of the car caused the accident. "[W]hen the negligence of defendant is shown, the fact that a third person was also guilty of negligence which contributed to the injury of the plaintiff, will not relieve the defendant from liability for its negligence."[60] Unlike the plaintiffs in *Saunders* and *Rouleau*, the plaintiff in *Sears* attempted to use the defective device and the evidence supported the allegation that it was faulty.

As illustrated by these cases, courts tend to exonerate the first acting defendant and have held the negligent party, who was closer in temporal proximity to the accident or injury, liable. Regardless of whether it is one plaintiff against two negligent defendants or whether the plaintiff's contributory negligence is at issue, the court's intuition seems to be that the negligent act most removed is not the "cause." However, the courts fail to recognize the possibility based on their concurrent omissions analysis that both parties could potentially be exonerated.

In assimilating the defective safety device cases with cases against manufacturers for failure to warn, David Fischer demonstrates how courts differ in how they deal with the issue of causation.[61] In some failure to warn cases, the courts have required that the plaintiff show that if a proper warning had been provided their behavior as the product user would have been affected and injury avoided. These cases exonerate the manufacturer "on the ground that the failure to warn did not cause the accident because the warning was not read."[62]

> In *Safeco Insurance Co. v. Baker*, for example, a manufacturer sold a prefabricated fireplace with unreasonably confusing installation instructions. The manufacturer wrote an addendum clarifying the instructions, but failed to provide it to the buyer. The buyer hired a carpenter with a sixth grade education to install the fireplace. He installed it improperly without reading most of the instructions provided, and the improper installation caused a fire in the buyer's home. The buyer sued both the manufacturer and the carpenter. The court held the manufacturer not liable for failing to provide the addendum to

57. *See id.* at 749.

58. *See id.* at 749-50.

59. *See id.* at 750.

60. *Id.* at 751-52.

61. *See supra* note 47.

62. *See* Fischer, *supra* note 26, at 1353 & n.76.

> the instructions. It ruled that the absence of the clarifying instructions did not cause the accident since the carpenter would not have read them.[63]

Fischer finds that some cases appear to exonerate the manufacturer defendant on the basis of the but-for test although the courts do not expressly state they are utilizing such a test.[64]

Other courts exonerate the manufacturer without any analysis at all and find that the injury was caused by the failure to read the label or manual.[65] What is consistent in Fischer's analysis, though, is that the manufacturer is exonerated. This premise does not prevail in Nebraska.

IV. ANALYSIS

The sequential *omissions* of two negligent defendants interacting to create a situation where an innocent plaintiff is unable to meet the burden of proving causation under the "but for" analysis parallels cases where concurrent *acts* have created an identical problem.[66] As between an innocent plaintiff and two negligent defendants, the plaintiff must not be left without redress because the factual context makes it impossible to prove causation.[67] Allowing recovery for an innocent plaintiff, who cannot meet the burden on causation due to the circumstances created by the defendant's negligence, has become rooted in the tort system and serves as the backdrop for a proposed solution to the stated hypothetical and focus of this note.

In a concurrent omission case, the plaintiff should recover, just as in related cases where the courts have made a policy choice, for one reason or another, to allow an innocent plaintiff to recover.

In *Kingston v. Chicago & N.W. Ry.*,[68] two fires merged destroying the plaintiff's property. The plaintiff could not show "but for" causation because the identity of the cause of only one fire was known and it could not be said that "but for" one of the fires, the other wouldn't have occurred. Joint and several liability could not apply with only one known tortfeasor. By shifting the burden to the known defendant to prove they did not cause the loss, the court crafted a narrow rule to

63. *Id.* at 1354.
64. *See id.* (citing E.R. Squibb & Sons, Inc. v. Cox, 477 So. 2d 963 (Ala. 1985) (holding stronger warning on package would not have prevented harm because plaintiff would not have read it) and Cobb Heating & Air Conditioning Co. v. Hertron Chem. Co., 229 S.E.2d 681, 683 (Ga. Ct. App. 1976) (holding detailed instructions would not have prevented fire if user did not read them)).
65. *See id.* at 1374 n.78 (citing McCleskey v. Olin Mathieson Chem. Corp., 193 S.E.2d 16, 18 (Ga. Ct. App. 1972) (holding failure to read label on drum of sanitizer caused harm)).
66. *See* Summers v. Tice, 199 P.2d 1 (Cal. 1948); Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Kingston v. Chicago & N.W. Ry., 211 N.W. 913 (Wis. 1927).
67. *See* Summers v. Tice, 199 P.2d 1 (Cal. 1948).
68. 211 N.W. 913 (Wis. 1927).

allow a plaintiff to recover in an effort to use traditional doctrine based on policy grounds.

In *Summers v. Tice*,[69] two hunters simultaneously shot their guns resulting in an injury to the plaintiff. The plaintiff could not prove by a preponderance of the evidence that either defendant's shot caused the injury.[70] But, both defendants acted negligently, and it was obvious that one of them caused the injury. The court shifted the burden of proof regarding causation to the negligent parties. The shooters then bore the burden of the unusual facts that prevented the plaintiff from establishing its case.[71] The innocent party then received the benefit of the situation created by the defendants. The *Restatement (Second) of Torts* adopted the court's holding in *Summers*. Where a small number of defendants have engaged in substantially simultaneous culpable conduct imposing similar risks on the victim, the burden may shift and they may be held as joint tortfeasors if none can exculpate himself.[72] They must, however, all be joined in the lawsuit.

The same policy choice went into the holding in *Sindell v. Abbott Labs*.[73] In *Sindell*, the plaintiff's mother ingested the drug DES while she was pregnant. As a result of her mother's taking the drug the plaintiff was injured and she sued the manufacturers of the drug. The court stated that once the plaintiff established a defendant manufacturer's culpability in making and marketing the drug at the time of her mother's ingestion, the defendant had the burden of proving it was not a supplier of the particular DES ingested by the plaintiff's mother.[74] If the defendant was unable to disprove causation, it was liable for its percent of market share at the time the mother was exposed.[75]

Likewise, in *Corey v. Havener*,[76] two defendants on motorcycles passed the plaintiff's horse, one on each side, and so frightened the horse because of their speed, noise, and smoke, that the horse ran away, thereby injuring the plaintiff.[77] In *Corey*, the plaintiff recovered from both defendants despite the obvious probability that either motorcycle alone would have produced the result, and the fact that each was sued separately (the actions were tried together).[78] Even though *Corey* involved simultaneous actions rather than actions in temporal sequence like the concurrent omission hypothetical, the ba-

69. 199 P.2d 1 (Cal. 1948).
70. *See id.* at 4.
71. *See id.* at 5.
72. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3).
73. 607 P.2d 924 (Cal. 1980).
74. *See id.* at 936.
75. *See id.* at 937.
76. 65 N.E. 69 (Mass. 1902).
77. *See id.*
78. *See id.*

sic premise of tort law prevails: compensating the innocent plaintiff based on a narrowly crafted rule of causation. "Where both causes involve the wrongful acts of legally responsible human beings there is virtual unanimity among courts in holding both (or either) liable for the whole injury . . . ."[79]

What all of these similar cases establish is that courts are willing to narrowly craft a rule, under unique circumstances, so that an innocent plaintiff is justifiably able to recover for injuries created by negligent defendants.

In the concurrent omission hypothetical, both defendants *are* negligent. The concurrent omission hypothetical is different, however, in that the shifting of the burden does not add anything to the equation. In the concurrent omission hypothetical, it is apparent that the individual, whose negligence was last in the chain of events by failing to apply the brakes at all, should be held responsible in some form for the plaintiff's injuries. That is the intuitive response demonstrated in the cases discussed in Part III.B. of this note. The question is whether the first negligent actor should benefit from having a subsequent negligent defendant in control of the already defective instrumentality? The answer is clearly "no." Temporal positioning of negligence should not relieve either party of liability in this situation.

Calabresi's approach of shifting the burden to the defendant in a failure to warn situation does not help in this situation[80] because the negligence of both defendants is determined, and either omission by itself is sufficient to bring about the result. Therefore, the point of requiring defendants to prove they were *not* the cause is moot. Some may argue that it is not certain that if the driver had attempted to use the brakes, they would have failed or that the driver would have had the wherewithal to attempt to steer better, maintain better focus and use of their own faculties, etc. Even if such a premise is adopted (although the defective instrumentality strongly suggests certain injury), the courts' decisions in failure to warn cases demonstrate that the first negligent actor is not so easily exonerated. Uncertainty always exists in the area of causation.

In traditional court cases, plaintiff must show "but for" a defendant's act, this injury would not have occurred. This requires hypothesizing an omission. The posed hypothetical involving a concurrent omission only raises the opposite analysis and the plaintiff must hypothesize an act. The analysis is identical to the "but for" test used every day but it is seemingly counter-intuitive.

Calabresi's *Liriano* holding, shifting the burden of the manufacturer to prove that the warning would not have been read, demon-

79. 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.3, at 114-15 (2d ed. 1986).
80. *See supra* notes 20-24.

strates that manufacturers in these cases are often *not* relieved of liability. It is difficult to prove that if a warning had been provided, the consumer would have read the warning and heeded its cautionary language. Therefore, in reality, manufacturers are often held liable. Holding the manufacturers liable reflects the deep-rooted principal that when an innocent plaintiff is unable to meet the burden on causation due to the circumstances created by negligent defendants, allocation of liability should be apportioned between both defendants. This occurs when it is clear that the defendants' negligence contributed in some way to the accident even though the technical requirements of "but for" causation are not met.

Relieving the first negligent actor in a concurrent omission case is not a desirable result under the established case law policy. Therefore, shifting the burden to the first negligent actor to prove that, even if the instrumentality had been effective the injury would have occurred, is not sound policy. In fact, burden shifting makes it even more likely in a concurrent omission fact pattern that the first actor could exonerate himself. Because the driver did, in fact, injure the plaintiff, the first negligent actor (the rental agency) would be able to exonerate himself every time. That result does not follow the established theory of how courts deal with the negligence of multiple defendants.[81]

Because shifting the burden of proof in the concurrent omission hypothetical is not of much use, Fischer's analysis to products liability and failure to warn cases may not be helpful.[82] However, these cases demonstrate a useful recovery scheme, more prevalent in the case law, to test the unique situation of concurrent omission.

Both defendants, if they are simultaneously present in the cause of action, should be liable to the injured plaintiff. Comparative liability has been devised in our court system to handle just this situation. Let the fact-finder apply its own intuition in allocating liability. It seems fair that both defendants should equally bear the burden in this situation. The first negligent actor should not be exonerated solely because of the way things played out.

The *Summers* court was willing to hold both defendants liable.[83] This demonstrates the strong position taken by the court in shifting the burden of causation to the defendants. At that time, each defendant could have potentially been independently liable for the total amount of damages. The trend has now moved away from applying joint and several liability where the inclusion of any one defendant could mean sole responsibility for the entire judgment. As a result, it

81. *See supra* notes 66-79 and accompanying text (discussing cases dealing with the issue of causation and multiple negligent defendants).

82. *See supra* Part III.A.

83. *See supra* notes 69-72 and accompanying text.

is more reasonable to apply comparative liability where the most probable result would be a fifty/fifty split of liability between the negligent defendants.

There is no need, as Robertson attempts, to recognize the destruction of a personal injury lawsuit as an actionable harm.[84] His intuition is right—it is too academic for practical purposes and quite frankly, not necessary to achieve the intuitive result. One case given to the jury can establish that given these circumstances, as between an innocent plaintiff and two negligent defendants concurrently omitting a specific act, both defendants are liable for plaintiff's injuries. It is one possible intuitive response.

One defendant should not be exonerated on the basis of a proximate cause analysis. Courts have to draw a line to limit liability. "Legal cause" gives them the language necessary to accomplish the limitation in a cause of action. By imposing liability on both defendants the courts are reflecting society's intuition that justice for the innocent plaintiff outweighs the cost of shifting the burden to the two, negligent defendants.

It is inevitable that an arbitrary line will be drawn and courts do not like to do it blatantly. Accordingly, it is rational to assert, in a situation of concurrent omissions, that both defendants are liable for their negligent actions. This result encourages socially useful behavior in the future. It is clear that *Y* driver will most certainly exercise safer judgment while driving. *X* rental agency, on the other hand, will not be encouraged to change his behavior, but will certainly have the same incentive to provide a safe product because nothing will relieve him of liability if he is negligent, including the coincidental negligence of the person in control of the instrumentality.

V. CONCLUSION

The hypothetical situation involving the misuse or nonuse of a defective safety device has been alternatively described as multiple-sufficient causes, duplicative or preemptive causes and concurring omissions. It involves a very narrow area of case law that deals with two or more negligent omissions resulting in injury or damage. Although many opinions have been advanced on how such cases are best handled, the answers are largely intuitive and based on whom the courts believe to be largely responsible. The early cases exhibit the courts' tendency to exonerate the first negligent defendant thereby placing liability on the defendant closer in temporal sequence. The academics, on the other hand, intuitively allocate liability among both negligent defendants. However, if the courts took a broader approach to the issue of causation in concurrent omission cases, they would see

84. *See* Robertson, *supra* note 2.

that the "but for" analysis is not always as apparent. While the traditional "but for" test is usually successful in allocating liability, in the context of concurring omissions, it unexpectedly exonerates each negligent defendant.

At the core of this debate lies the foundation of our tort system. The intuitive responses to the concurrent omission fact pattern provide an insight into the belief of each individual's view of how the tort system should compensate victims. If viewed from the practical standpoint of existing case law and comparative negligence standards, allocating liability among both negligent defendants in a concurrent omission fact pattern is the common sense approach.

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